Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, Comptroller of the Currency,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS

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QUESTION PRESENTED FOR REVIEW

Whether the McFadden Act is applicable to offices of a national bank at which no money is lent, no deposits accepted and no checks paid.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of

the parties, to urge the Court to grant the Petitions for Writ of Certiorari to review that part of a decision by the United States Court of Appeals for the District of Columbia Circuit which held that discount brokerage offices of national banks are "branches" of the banks and therefore governed by the geographical limitations upon the location of such offices imposed upon "branches" of banks by the McFadden Act, 12 U.S.C. § 36.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. Its membership of approximately 12,000 banks includes banks chartered by the Comptroller of the Currency ("national banks") and banks chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia. The Association frequently appears in litigation, either as a party or as an amicus curiae, in order to represent the interests of the banking industry at large in particularly important cases. This is such a case. The Association has appeared as amicus curiae in this case in both the District Court and in the Court of Appeals.

Officially, this case presents the question whether or not discount brokerage offices established under the auspices of an operating subsidiary of a national bank are "branches" for purposes of the McFadden Act. In and of itself, that is a question of major importance to the banking industry, since several thousand commercial banks are involved, in one way or another, in the discount brokerage business. If the

decision of the District of Columbia Circuit stands, the Comptroller will be compelled to withdraw his approval of existing discount brokerage offices of national banks operating across state lines and to refuse approval to any future applications by national banks to establish such offices. In addition, it is probable (though in most cases not compulsory) that state regulators and state courts construing state branching statutes would follow the District of Columbia Circuit's determination that discount brokerage offices are, indeed, "branches" of banks. That would have a deleterious impact upon state bank members of the American Bankers Association as well.

However, in its broadest implications, this case is not only about discount brokerage offices. This is an era of "deregulation" of the banking industry. Through recent enacted legislation, administrative actions of the federal banking regulatory agencies, and a series of judicial decisions by this and lower courts, commercial banks are expanding the range of products and services they provide for the public well beyond the simple taking of deposits, lending of money, and paying of checks. It is a crucial—and unanswered—question where these expanded activities may be performed. In order to answer that question, the industry, the bench and the bar must have definitive guidance, which only this Court can supply, on what does and does not constitute a "branch" of a bank. This Court has previously held that the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. *First National Bank in Plant City v. Dickinson,* 396 U.S. 122, 135 (1969) (emphasis supplied).

The American Bankers Association, on behalf of its members, is vitally interested in having the Court now flesh out the *more*, if anything, which the definition *may* include, and this case is clearly an appropriate vehicle for doing so.

SUMMARY OF THE ARGUMENT

This Court has left open the question of whether a place of business of a national bank is a branch of that bank, even if no money is lent there, no deposits accepted, and no checks paid. In the principal Supreme Court decision in this area, the Court found that deposits were in fact received at the alleged "branch," thus bringing it within the clear meaning of the statute. Consequently, this Court did not then have occasion to determine, in a true case and controversy, how far the meaning of the word "branch" could be stretched. Since national banks have maintained, and do maintain, places of business at which only activities other than the three mentioned in the McFadden Act are performed, and the existence of those business locations has inspired continuing litigation, we respectfully suggest that the interpretation of the McFadden Act is an important question of federal law which has not been, but should be, decided by this Court.

It is particularly important for the Court to resolve the continuing disputes over the proper construction of the McFadden Act in this case, because the Court of Appeals below, the District of Columbia Circuit, is the one having the power to establish a nationwide construction of the McFadden Act. The Comptroller, whose approval is necessary for a national bank to create an operating subsidiary, can always be sued in

the District of Columbia for granting such an approval, 28 U.S.C. § 1319(e), and the District of Columbia Circuit has decided this important issue of federal law incorrectly. The history of national banking which led to the enactment of the McFadden Act shows, definitively, that national banks did operate places of business away from the chartered premises of the bank prior to the enactment of the McFadden Act; those places of business were less than full service branch offices; and the intent of the law was not to limit the operation of those non-full-service locations, but rather to *allow* the operation, in appropriate circumstances, of business locations which *were* full service facilities.

ARGUMENT

I. Background Of the Case

In June and July 1982, two national banks, Union Planters National Bank of Memphis and Security Pacific National Bank (California), applied to the defendant, Comptroller of the Currency, for permission to own discount brokerage subsidiaries. In the case of Union Planters, the ownership was to come about by means of acquiring a going concern, Brenner Steed and Associates, Inc. In the case of Security Pacific, the intent was to establish a de novo discount brokerage subsidiary. A "discount broker" is known as such because of the low commissions it charges. It "can afford to charge lower commissions than full service brokerage firms because it does not provide investment advice or analysis, but merely executes the purchase and sell orders placed by its customers." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 82 L. Ed. 158, 162 n.

2 (1984). Both applications indicated an intention, eventually, to operate the discount brokerage subsidiaries at locations other than the main office and authorized branch offices of the respective parent banks, including locations outside the state in which the respective parent banks are located. In August and September, 1982, the Comptroller approved the two applications.

The Respondent trade association, fearing competitive injury to its members, filed suit challenging the Comptroller's approvals as being in violation of the Glass-Steagall Act and the McFadden Act. On November 2, 1983, Judge Flannery handed down a decision, *Securities Industry Association v. Comptroller of the Currency,* 577 F. Supp. 252 (D.D.C. 1983), in which he held that "the Glass-Steagall Act does not prohibit the ownership and operation by national banks of subsidiaries engaged in the brokerage business." *Id.* at 257.[1] However, the Court went on to hold "that an office of a national bank for the conduct of discount brokerage activities is a 'branch' within the definition of Section 36 (f) of the McFadden Act, subject to state law restrictions on the establishment of bank branch offices." *Id.* at 260.

The U.S. Court of Appeals affirmed the decision of the District Court "generally for the reasons stated in its Memorandum Opinion." *Securities Industry Association v. Comptroller of the Currency,* 758 F.2d 739, 740 (D.C. Cir. 1985). Rehearing en banc was

[1]This portion of the decision of the lower courts is subject to a separate Petition for Writ of Certiorari now pending before this Court, *Securities Industry Association v. Comptroller of the Currency, petition for cert. filed,* 54 U.S.L.W. 3170 (U.S. Sept. 9, 1985) (No. 85-392).

refused, 765 F.2d 1196 (D.C. Cir. 1985). Petitions for Writs of Certiorari were filed by the Comptroller of the Currency and by the Intervenor, Security Pacific National Bank, on December 9, 1985.

II. Reasons For Granting The Petitions For Writ Of Certiorari

A. This Case Presents An Important Question Of Federal Law Which Has Not Been Decided By The Supreme Court, But Should Be.

In the decision of the District Court (in essence adopted by the Court of Appeals), Judge Flannery relied extensively upon the post-passage comments of Representative McFadden in which the Congressman maintained that "[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting *any* business carried on at the main office is a branch." 68 Cong. Rec. 5,816 (1927) (emphasis supplied). If that is to be the definitive interpretation of a statute which defines "branch" to include a place of business at which the deposit receiving, money lending, and check paying functions are performed (and which manifestly does *not* say that a "branch" is a place where *any* business is transacted), then the implications of the court's conclusion far exceed the bounds of this case, which pertains only to the operation of discount brokerage offices of national banks. In addition to the many such offices now in existence, or anticipated, operated or to be operated by the two banks immediately involved in this case and by many other national banks, the fact of the matter is that national banks now maintain a variety of off-premises facilities at which they trans-

act *some* business, though not any of the three functions set forth in the statutory definition.

As the Comptroller of the Currency pointed out in his decision on the application of Security Pacific to establish a discount brokerage facility, "[a] number of banks currently operat[e] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra-state and interstate basis." Petition for Certiorari, Appendix D at 44a, *Clarke v. Securities Industry Association,* No. 85-971 (U.S. Dec. 9, 1985).

In addition, the Comptroller also describes the practice of "a number of banks" in maintaining non-branch facilities for "record custody and the clearing and settlement of transactions," ministerial and clerical functions not involving direct dealing with the public. *Id.*

National banks also operate "loan production offices," both interstate and intrastate,[2] with the approval of the Comptroller. A loan production office is a place from which agents or employees of a national bank may originate loans, provided that the loans so originated are actually approved and made at the main office or a branch office of the bank (12 C.F.R. § 7.7380 (1985)).

[2]We are unaware of any published reports revealing the current number of loan production offices (LPO's) operated by national banks, but there were already approximately 350 in 1978. *See* Rubenstein, *IBAA Plans Suit to Force End of Loan Production Offices,* American Banker, May 8, 1978, at 1, 44. The threatened lawsuit to which this article refers was filed but was ultimately unsuccessful. The District of Columbia Circuit held the suit to be barred by laches, so it did not officially reach the merits of the case. Nevertheless, in a long footnote to the opinion, the court indicated its belief that the LPO's were legal because they did not perform any of the three enumerated functions of a "branch." *Independent Bankers Association of America v. Heimann,* 627 F.2d 486, 488 (D.C. Cir. 1980). It is impossible to reconcile that reasoning with the decision at issue here, though both cases were decided by the same court.

National banks (as well as state banks) also transact business with their customers through electronic devices commonly known as automated teller machines or ATM's, often owned and operated by parties other than the bank or banks themselves, often shared with other financial institutions. There are hundreds of shared ATM networks involving thousands of financial institutions and thousands of ATM's.[3] The Second Circuit has concluded that such devices do not constitute "branches" within the meaning of the McFadden Act. *Independent Bankers Association of New York State v. Marine Midland Bank,* 757 F.2d 453 (2d Cir. 1985), *petition for cert. filed* 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023).

The legitimacy of all off-premises facilities of national banks must necessarily be called into serious question if the McFadden Act's branching restrictions are to be applied to *any* business transacted. The language of the statute itself does not require that result, and this Court has never so held. As we indicated above, this Court has held only that the performance of one or more of the three statutorily enumerated functions defines the minimum content of the term "branch" *may* include more. *First National*

[3]Felgran, *Shared ATM Networks: Market Structure and Public Policy,* New England Economic Review, Jan.-Feb. 1984 at 23, 28-29.

Bank in Plant City v. Dickinson, 396 U.S. at 135. Whether it actually does include more, and, if so, what that might be, remain unanswered and too often litigated questions which ought to be resolved by this Court.

B. The Issue Presented Here Was Wrongly Decided By The Court Below.

In granting controlling importance to the post-passage remarks of Representative McFadden discussed above, the court of appeals (by adopting the reasoning of the district court) ignored the factual history surrounding the passage of the McFadden Act in favor of an expression of opinion by a single Congressman. The factual history, however, manifestly shows that the object of the legislation was to expand rather than contract the opportunity of national banks to serve their customers.

As early as at least 1911, the Attorney General of the United States had concluded that national banks were not authorized by statute to operate branch banks. 298 Op. Att'y Gen. 81, 98 (1911). This Court reached the same result in *First National Bank in St. Louis v. Missouri,* 263 U.S. 640 (1924). Nevertheless, the Attorney General distinguished between full-fledged branch offices and "additional offices" or "tellers windows" which performed routine services such as the receipt of deposits and the cashing of checks. While "branches" were illegal, "additional offices" were not. 34 Op. Att'y Gen. 1 (1923). The inability of national banks to operate full service branches, at least in states where state chartered banks were permitted to do so, left national banks at a competitive disadvantage, and their ability to utilize "additional offices" was insufficient to remedy

that disadvantage. 66 Cong. Rec. 4,432 (1925) (Statement of Senator Pepper, chief Senate sponsor of the McFadden Act).

Additional "offices" of national banks, which were nevertheless not "branches," preexisted the McFadden Act and were not intended to be outlawed by the McFadden Act.

The McFadden Act was discussed and debated in Congress for three years before its passage. In all of that time, there is no evidence to be found that Congress intended to require that all of the business of national banks be conducted at main offices and authorized branch offices. Indeed, the only contemporaneous reference to be found to the effect that a place other than a main office for the transaction of any business constitutes a "branch" is the ambiguous statement of Congressman McFadden mentioned above. That single piece of legislative history should be disregarded entirely. Not only was the statement made after the law was passed, but it was also a statement that was simply inserted into the Congressional Record as an "extension of remarks" ten days after Congress adjourned (68 Cong. Rec. 5,969, 5,974 (daily ed., March 14, 1927)), leaving no real opportunity for other Congressmen or Senators to state a contrary understanding of the law. Sponsor or not, Congressman McFadden was only one Congressman. When we seek to discover the intent of the legislature, we must look to the intent of all of the Congress or of the majority voting for the bill. This Court has held that the "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before passage."

Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974).

The post-passage history of the McFadden Act is instructive in one respect, however. During and before 1927, a number of commercial banks, including national banks, owned full-fledged securities firms, operated as subsidiaries of the banks and maintaining offices in states other than the home state of the parent bank. The passage of the McFadden Act in that year had absolutely no effect upon the business locations of the banks' securities affiliates or subsidiaries. They continued their activities, unchallenged and uninterrupted until passage of the Glass-Steagall Act in 1933. *See* Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess. 1056-57 (1931). Glass-Steagall, of course, made unlawful the affiliation of full-fledged securities firms as such and national banks—without regard for the location of the respective offices of the affiliated businesses. If it had been intended that the offices of a bank's securities affiliates would be included within the definition of "branch," it is, to say the least, odd that none of the contemporaneous Congressmen, Senators, regulators or competitors of the banks seem to have raised the issue during the entire period from 1924 to 1934 when the Glass-Steagall Act went into effect and substantially mooted the question. As this Court has recently indicated, in another context, the universal behavior of entities regulated by an Act, after its passage, though it is not conclusive, at least supports the view that the Act actually means what they understand it to mean. *See Securities Industry Association v. Board of Governors of the Federal Reserve System*, 82 L. Ed. 2d 107, 124 (1984).

CONCLUSION

For the reasons stated herein, the American Bankers Association respectfully maintains that (in the absence of new legislation) only plenary consideration by this Court of the important issues surrounding interpretation of the McFadden Act, now nearly sixty years old, can provide the necessary guidance to our members and other interested parties in the conduct of the modern banking business. The Petitions for Writ of Certiorari should be granted.

Respectfully submitted,

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